IN THE

SUPREME COURT OF THE UNITED STATES

CASE NO. 82-5096

KENNETH DARCELL QUINCE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent

A P P E N D I X

APPENDIX

Kenneth Darrell QUINCE, Appellant,

v.

STATE of Florida, Appellee.

No. 59954.

Supreme Court of Florida.

March 4, 1982.

Rehearing Denied May 27, 1982.

Defendant was convicted in the Circuit Court, Volusia County, S. James Foxman, J., after he entered pleas of guilty to charges of felony-murder in the first degree and burglary. Direct appeal was taken from the imposition of the sentence of death. The Supreme Court held: (1) the trial judge did not err in giving only little weight to the sole mitigating factor, substantial impairment of defendant's capacity to appreciate the criminality of his act or to conform his conduct to the law; (2) the severe beating, wounding, raping and manual strangulation of an 82-year-old frail woman easily qualified as heinous; (3) it was not improper to double the aggravating circumstances when the judge found that the homicide was committed during a rape and was committed for pecuniary gain; (4) the record did not support the defendant's claims of additional mitigating factors; (5) both sides had equal opportunity for closing argument; and (6) even though it was improper to impose a general sentence for two separate offenses, there was no harm where the death penalty had been approved.

Sentence of death approved.

1. Criminal Law ⇐1208(1)

Defendant may be competent to stand trial, and yet nevertheless receive benefit of mitigating factors involving diminished mental capacity in determining whether death penalty should be imposed.

2. Homicide ⇐354

In imposing sentence of death following conviction of felony-murder in first degree and burglary predicated on guilty pleas, trial judge recognized "substantial impairment" mitigating factor and it was not unreasonable to fail to give great weight to that mitigating factor in light of three aggravating factors which had been found.

3. Homicide ⇐354

Severe beating, wounding, raping and manual strangulation of 82-year-old, frail woman qualified as "heinous" to justify imposition of death penalty.

See publication Words and Phrases for other judicial constructions and definitions.

4. Homicide ⇐354

When death penalty was imposed on defendant after conviction of felony-murder in the first degree and burglary predicated on guilty pleas, there was no improper doubling of aggravating circumstances when judge found that homicide was committed during rape and committed for pecuniary gain.

5. Homicide ⇐354

In imposing death sentence on defendant after conviction of felony-murder in first degree and burglary predicated on guilty pleas, trial judge did not improperly consider non-statutory aggravating factors concerning likelihood of rehabilitation and lack of remorse.

6. Homicide ⇐354

In imposing death sentence on defendant after conviction of felony-murder in first degree and burglary predicated on guilty pleas, defendant's juvenile record could be used to dispel mitigating circumstance that defendant had no significant prior criminal history.

7. Criminal Law ⇐724(2)

Defendant waived issue of whether State was permitted two closing arguments in prosecution for felony-murder in the first degree and burglary predicated on guilty pleas where both sides had equal opportunity for argument and defendant failed to make definite objection. West's F.S.A. Rules Crim.Proc., Rule 3.780(c).

APP. 1

8. Criminal Law ⇐1177

Even though it was improper for trial judge to impose general sentence after defendant was convicted of felony-murder in the first degree and burglary predicated on guilty pleas, that did not mandate reversal where no harm would be caused to defendant by that error, since imposition of death penalty for felony-murder prosecution was appropriate.

James B. Gibson, Public Defender and James R. Wulchak, Chief, Appellate Div., Asst. Public Defender of the Seventh Judicial Circuit, Daytona Beach, for appellant.

Jim Smith, Atty. Gen. and Shawn L. Briese, Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIAM.

This is a direct appeal from conviction of felony-murder in the first degree and burglary predicated on guilty pleas, and a sentence of death imposed by the trial court alone due to defendant's waiver of a sentencing jury. Art. V, § 3(b)(1), Fla.Const. Our sole task is to review the propriety of the death sentence.

In December of 1979, the body of an eighty-two year old woman dressed in a bloodstained nightgown was found lying on the floor of her bedroom. She had bruises on her forearm and under her ear, a small abrasion on her pelvis, and lacerations on her head, which were severe enough to cause death. She was sexually assaulted while alive, but the medical examiner could not determine whether the victim was conscious or unconscious during the battery. Strangulation was the cause of death.

Based upon a fingerprint identification, appellant was arrested. Although he initially denied knowledge of the incident, he later confessed to the burglary. He also admitted to stepping on the victim's stomach before leaving her house. A month later, when faced with laboratory test results, he admitted that he sexually assaulted the deceased. The grand jury returned an indictment charging the appellant with first-degree murder, burglary, and sexual battery.[1]

Pursuant to plea negotiations, appellant waived the right to a sentencing jury. After hearing and weighing the evidence, the trial judge imposed the death sentence, finding the existence of three aggravating circumstances: 1) the murder was committed during the commission of a rape; 2) the murder was committed for pecuniary gain; and 3) the murder was heinous. He considered and rejected all but one mitigating factor: appellant's inability to appreciate the criminality of his conduct. Due to the conflicting evidence, however, he decided that this factor deserved little weight.

We address first appellant's most forceful argument, in which he asserts that the trial judge erred in giving only little weight to the sole mitigating factor found, substantial impairment of capacity to appreciate the criminality of his act or to conform his conduct to the law.[2] The trial judge noted in his sentencing order, and the record supports, that although the experts agreed that Quince was not of normal intelligence, the exact degree of mental impairment could not be conclusively established. Four of the five experts that examined Quince found his mental condition did not warrant application of mitigating factors concerned with mental capacity. The fifth expert found Quince lacked the ability to appreciate the criminality of his acts, and compared his mental abilities to those of an eleven-year old. But age equivalency as an expression of Quince's mental ability was sharply questioned by one expert, and essentially rejected by another. The consensus seems to have been that Quince was of dull normal or borderline intelligence, but was not mentally retarded. No expert had found Quince incompetent to stand trial.

1. The sexual battery charge was later dismissed because it was the underlying felony to the felony-murder offense.

2. § 921.141(6)(f), Fla.Stat. (1979).

[1, 2] We are well aware that a defendant may be competent to stand trial, yet nevertheless receive the benefit of the mitigating factors involving diminished mental capacity. *See Mines v. State*, 390 So.2d 332, 337 (Fla.1980), *cert. denied*, 451 U.S. 916, 101 S.Ct. 1994, 68 L.Ed.2d 308 (1981). But we do not interpret *Mines* to require any more from a trial judge than that he give due consideration and weight to these factors in his sentence. Here the trial judge recognized the "substantial impairment" mitigating factor, but found that it did not outweigh the three aggravating factors.

This is not a case in which a jury has rendered a recommendation of life based on evidence of mental incapacity and the trial judge has rejected such a recommendation. *See, e.g., Neary v. State*, 384 So.2d 881 (Fla.1980); *Shue v. State*, 366 So.2d 387 (Fla.1978); *Jones v. State*, 332 So.2d 615 (Fla.1976). All of these cases are based on the rationale that the jury's recommendation can only be rejected for a compelling reason, because the jury represents "the conscience and mores of the community in which the crimes were committed." *Jones*, 332 So.2d at 622 (Sundberg, J., concurring). This is not a case in which the trial judge failed entirely to take the defendant's mental condition into account. *See Mines*. The trial judge demonstrated in his sentencing order his close consideration of this very factor. Nor is this a case in which the trial judge considered matters he should not have.

Rather, this is a case in which the appellant disagrees with the *weight* that the trial judge accorded the mitigating factor. But mere disagreement with the force to be given such evidence is an insufficient basis for challenging a sentence. *See Hargrave v. State*, 366 So.2d 1 (Fla.1978), *cert. denied*, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979).

Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.

Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla.1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981) (footnote omitted). The trial judge was not unreasonable in failing to give great weight to this mitigating factor, which he nevertheless did find to exist, in the light of contradictory evidence. The trial judge clearly did not ignore every aspect of the medical testimony as the judge did in *Huckaby v. State*, 343 So.2d 29 (Fla.), *cert. denied*, 434 U.S. 930, 98 S.Ct. 393, 54 L.Ed.2d 276 (1977).[3]

[3-5] Appellant further assails the sentence on sundry grounds. He claims the murder was not heinous. We believe that the severe beating, wounding, raping, and manual strangulation of an eighty-two year old, frail woman easily qualified as heinous. *Cf. Peek v. State*, 395 So.2d 492 (Fla.1980), *cert. denied*, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981) (beating, rape and strangulation of sixty-five year old woman is heinous). He next asserts that the underlying felony of sexual battery may not be used in aggravation. Florida's death penalty statute clearly allows the use of the underlying felony in aggravation, and that statute is constitutional. *See Proffitt v.*

3. *Huckaby v. State* also differs from the present case because the capital crime was rape of a child, for which imposition of death has since been declared unconstitutional. *Buford v. State*, 403 So.2d 943 (Fla.1981). There was also overwhelming evidence of defendant's mental illness in *Huckaby*.

Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Appellant contends that there was an improper doubling of aggravating circumstances when the judge found that the homicide was committed during a rape and was committed for pecuniary gain,[4] and then used these facts as parts of his heinous finding. But doubling has been disallowed when the underlying felony is robbery or burglary and is considered in addition to the aggravating factor of "committed for pecuniary gain." *See Provence v. State*, 337 So.2d 783 (Fla.1976), *cert. denied*, 431 U.S. 969, 97 S.Ct. 2929, 53 L.Ed.2d 1065 (1977). Appellant argues an improper consideration of nonstatutory aggravating factors when evidence was given concerning likelihood of rehabilitation and lack of remorse. But neither of these factors were considered in aggravation by the judge in his sentencing order and were accorded no weight in the sentencing process.

[6] Quince complains that certain additional factors should have been found in mitigation. He posits that because his record of past offenses is a juvenile record and too remote, he should have been found to have no significant prior criminal history. This Court has allowed juvenile records to dispel this mitigating circumstance when the circumstances warrant. *See Brooker v. State*, 397 So.2d 910 (Fla.1981). These juvenile offenses were not trivial, and included armed robbery and burglary. Quince pleads that his age of twenty years is a mitigating factor. Yet, as we stated in *Peek v. State*, there is no *per se* rule that pinpoints an age as a mitigating factor. *Id.* at 498. *Peek* in fact upheld the rejection of the age of nineteen as a mitigating factor. Nor does the record support appellant's claim that the trial judge limited his consideration to only statutory mitigating circumstances.

[7] Quince finally assails the formalities of the sentencing procedure. He complains that the state was permitted two closing arguments in violation of Florida Rule of Criminal Procedure 3.780(c).[5] The record establishes, however, that both sides had an equal opportunity for argument. The appellant did not make a definite objection to the allowance of two arguments for both sides, and therefore waived this error. *See Clark v. State*, 363 So.2d 331 (Fla.1978); *State v. Jones*, 204 So.2d 515 (Fla.1967).

[8] Quince's final argument is that a general sentence was improperly imposed on him for two separate offenses, violating the dictates of *Dorfman v. State*, 351 So.2d 954 (Fla.1977). General sentences are also prohibited by statute. § 775.021(4), Fla. Stat. (1979). Although appellant is technically quite correct in asserting the trial judge was in error in imposing such a general sentence, and we must disapprove the practice, we cannot say that Quince's sentence is similar to that involved in *Dorfman*. The death sentence Quince received could only have been imposed for the murder he committed, not for the burglary. If we had vacated the murder conviction, the death sentence would necessarily have fallen. Thus, we face none of the "inscrutability" created by the general sentence in *Dorfman*. *Id.* at 957. Second, since death is deemed the proper penalty, concerns that a general sentence interferes with the rehabilitative process are moot. *See Dorfman*, 351 So.2d at 955 n. 7. We fail to see the harm caused to appellant by this error since he stands only to lose on resentencing, in light of our approval of the death penalty.

Although each murder conviction and death sentence presents amazingly unique circumstances, we find that death is the justifiable punishment in light of the existence of three aggravating factors and one mitigating factor, and that such a heavy penalty is proportionate to those meted out in similar cases. *See, e.g., Brooker v. State; McCrae v. State*, 395 So.2d 1145 (Fla.1980); *Peek v. State*.

4. The appellant confessed both to the burglary and rape of the victim, and could hardly contest that these factors did not exist beyond a reasonable doubt.

5. "Both the state and the defendant will be given an equal opportunity for argument, each being allowed one argument. The state will present argument first."

IN THE SUPREME COURT OF FLORIDA

CASE NO. 59,954

KENNETH DARCELL QUINCE,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

RECEIVED
MAR 17 1982
ATTORNEY GENERAL
DAYTONA BEACH, FLA.

MOTION FOR REHEARING

The Appellant, by his undersigned counsel, and pursuant to Rule 9.330, Florida Rules of Appellate Procedure, moves this Court for a rehearing in the above-styled cause. As grounds for the rehearing, the Appellant suggests that this Court has overlooked or misapprehended the following points of law or fact:

1. On page 2 of the slip opinion, this Court states that the record supports that "the exact degree of [Quince's] mental impairment could not be conclusively established" and that "[f]our of the five experts that examined Quince found his mental condition did not warrant application of mitigating factors concerned with mental capacity." However, it must be noted, and this Court has apparently overlooked the fact that only two experts were asked to examine the defendant for potential mitigating circumstances, (R 5-6, 7-8, 13-14) and only Dr. McMillan performed specific tests for this purpose. (T 115, 158) The two experts who examined Quince for mental impairment agreed that Quince was mentally retarded, and was "not functioning with all his marbles." (R 57; T 144, 157-158) Even the state's psychiatrist agreed that Quince was of below normal intelligence, functioning in the "dull-normal" range. (R 54; T 111, 128-129) Thus, contrary to this Court's opinion, the record does show Quince's exact degree of mental impairment.

APP. 2

The defendant's dull-normal, borderline retarded intelligence is surely a mitigating factor, either under Section 921.141(6)(f), Florida Statutes (1979), or else as a non-statutory mitigating factor. Moreover, the Court has misapprehended the reports of Drs. Rossario and Carrera. These psychiatrists did not find, as erroneously stated in the opinion, that Quince's mental condition did not warrant application of mitigating factors, since their reports and opinions were concerned solely with Quince's competence to stand trial and his sanity. Nonetheless, Dr. Rossario did indicate in his report that Quince's "judgement is markedly impaired...." (R 55)

Thus, this Court has overlooked and/or misapprehended the psychiatric reports conclusively showing, contrary to the trial judge's findings and this Court's opinion, that the mitigating factors (statutory and non-statutory) concerned with mental capacity are entitled to great weight which outweigh any aggravating factors.

2. Next, this Court in stating at slip opinion page 3, "Nor is this a case in which the trial judge considered matters he should not have," has overlooked the fact that the trial court allowed testimony, over defense objections, as to Quince's lack of remorse (T 56), and, in fact, personally elicited testimony concerning the possibility of Quince's rehabilitation. (T 148) See also slip opinion, at page 5. This non-statutory evidence was improperly elicited, admitted, and therefore presumably considered by the trial judge. See Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977); Riley v. State, 366 So.2d 19 (Fla. 1978); Miller v. State, 373 So.2d 882 (Fla. 1979). The defendant's sentence was therefore impermissibly imposed in violation of Article I, Sections 9 and 17 of the Florida Constitution, and the Eighth and Fourteenth Amendments to the Constitution of the United States.

3. This Court, in its opinion at pages 3-4 exhibits a recent change in its sentence review function, claiming that this Court will no longer weigh or reevaluate evidence concerning aggravating or mitigating factors in comparison with prior decisions. This holding overlooks the mandate of State v. Dixon, 283 So.2d 1, 8 and 10 (Fla. 1973), Songer v. State, 322 So.2d 481, 484 (Fla. 1975), and Proffitt v. Florida, 428 U.S. 242 (1976), to determine independently whether the imposition of the ultimate penalty is warranted. As the Supreme Court of the United States noted in Proffitt, 428 U.S. at 252-253:

> The Florida capital-sentencing procedures thus seek to assure that the death penalty will not be imposed in an arbitrary or capricious manner. Moreover, to the extent that any risk to the contrary exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted." Songer v. State, 322 So.2d 481, 484 (1975). See also Sullivan v. State, 303 So.2d 632, 637 (1974)

This Court's change from its independent sentence review responsibilities, overlooks these decisions and renders Florida's death penalty unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution since the discretion of juries and judges is no longer controlled and channeled, and the penalty is being imposed and affirmed in an arbitrary and capricious manner.

4. In affirming the finding of heinous, atrocious, or creul, this Court has overlooked the more gruesome facts of Halliwell v. State, 323 So.2d 557 (Fla. 1975); Burch v. State, 343 So.2d 831 (Fla. 1977); Chambers v. State, 339 So.2d 204 (Fla. 1976); Jones v. State, 332 So.2d 615 (Fla. 1976); and other cases in which this Court has found this aggravating circumstance to be lacking. In citing Peek v. State, 395 So.2d 492 (Fla. 1980), as a similarly heinous case, this Court overlooks the fact that the extremes present in Peek were simply not

present in the instant case; there were no crushed ribs nor the degree of suffering which was present in Peek. The victim in the instant case was not severely beaten, but was bruised on her arms only from striking the defendant. She was sexually assaulted when she was unconscious. (R 54) Additionally, the Court has overlooked the fact that any "heinousness" was caused by Quince's mental retardation and impairment. (T 144, 147-149) See Huckaby v. State, 343 So.2d 29, 34 (Fla. 1977); Miller v. State, 373 So.2d 882, 886 (Fla. 1979).

5. This Court, in rejecting Appellant's "doubling" argument states at pages 4-5 that doubling has only been disallowed when the underlying felony of robbery is considered in addition to the aggravating factor of "committed for pecuniary gain." This holding overlooks the decision of Clark v. State, 379 So.2d 97 (Fla. 1980), wherein an improper doubling was found by consideration of both factors of "for purpose of avoiding or preventing a lawful arrest" and "to disrupt or hinder a governmental function." See also Maggard v. State, 399 So.2d 973, 977 (Fla. 1981), wherein the Court found an improper doubling of burglary and pecuniary gain. The Court's opinion has misapprehended the "doubling" argument here. Appellant contended that the trial judge, in finding the sexual battery and burglary as aggravating circumstances, should not also have been allowed to refer to these factors in support of his finding of heinous, atrocious, or cruel. To do so violates Provence v. State, 337 So.2d 783, 786 (Fla. 1976). By using the fact of the sexual battery to make the crime heinous, and by using the burglary to make the killing heinous, the judge improperly referred to the same aspects of the defendant's crime to find three aggravating factors rather than two. The finding of heinous, atrocious, or cruel must be stricken as an improper doubling.

6. The Court, in rejecting the defendant's age of twenty as a mitigating factor, overlooks the cases of King v. State, 340 So.2d 315 (Fla. 1980) (age 23); Mikenas v. State, 367 So.2d 606 (Fla. 1978) (age 22); Hoy v. State, 353 So.2d 826 (Fla. 1977) (age 22); and Hallman v. State, 305 So.2d 180 (Fla. 1974) (age 23), wherein older ages in similar cases have been considered as mitigating factors. This Court also overlooked the fact that Quince's age can be coupled with the fact of his "dull-normal" intelligence to find a strong mitigating factor as was the case in Meeks v. State, 336 So.2d 1142 (Fla. 1976).

7. Finally, this Court's opinion overlooks the strong non-statutory mitigating factors of the defendant's tough personal and family life as argued at page 17 of the initial brief which factors were quite similar to those justifying a reversal to a life sentence in Neary v. State, 384 So.2d 881 (Fla. 1980). To overlook these mitigating factors renders the defendant's sentence unconstitutional under the rationale of Lockett v. Ohio, 438 U.S. 586 (1978), and under the comparative review standards required by Proffitt v. Florida, supra.

WHEREFORE, the appellant respectfully requests that this Honorable Court grant this motion for rehearing, withdraw the March 4th opinion in this cause, and reverse the case for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Jim Smith, Attorney General, in his basket at the Fifth District Court of Appeal and mailed to: Mr. Kenneth D. Quince, Inmate No. 075812, Florida State Prison, P. O. Box 747, Starke, FL 32091 on this 17th day of March, 1982.

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

KENNETH DARCELL QUINCE, Appellant,	)	
vs.	)	CASE NO. 59,954
STATE OF FLORIDA, Appellee.	)	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR VOLUSIA COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

RECEIVED
MAY - 8 1981
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DAYTONA BEACH, FLA.

JAMES B. GIBSON
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due 6-22-81

APP. 3

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

TABLE OF CITATIONS (Continued)

OTHER AUTHORITIES:

IN THE SUPREME COURT OF FLORIDA

KENNETH DARCELL QUINCE, Appellant, vs. STATE OF FLORIDA, Appellee.	)	CASE NO. 59,954

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

In this brief, the following symbols will be used:

"R" - Record on Appeal

"T" - Transcript of the Sentencing Hearing

"SR" - Supplemental Record on Appeal (Plea Hearing) filed on April 29, 1981

STATEMENT OF THE CASE

On January 17, 1980, the grand jury returned an indictment charging the defendant with first degree murder of Francis Bowdoin, sexual battery of Frances Bowdoin, and burglary of an occupied dwelling with an assault therein of the residence of Frances Bowdoin, stemming from an incident on December 28, 1979. (R1) Following mental examinations which, according to the psychiatrists, revealed that Quince was legally sane at the time of the offense and was competent to stand trial, the defendant entered pleas of guilty to Count I (first degree felony murder committed during the course of the sexual battery) and Count III (burglary). (R4,5-8,48-56;SR5-17) Count II, the sexual battery charge, was dismissed by the court, upon motion by the defense, because it was the underlying felony of the felony murder. (R11-12,29;SR18-19) Pursuant to the plea negotiations, the defendant waived a sentencing jury, the court to hold a hearing for aggravating and mitigating evidence to be presented to the judge alone. (SR6-8)

A penalty phase hearing before the judge alone was held on October 20, 1980. (T1-208) On October 21, 1981, based upon the evidence and arguments presented at the hearing and based upon the pre-sentence investigation, the trial court imposed a sentence of death upon Kenneth Quince. (R30;T210-212) In its findings of fact, the court found as

aggravating circumstances: (d) the murder was committed while the defendant was committing rape; (f) the murder was committed for pecuniary gain; and (h) the murder was especially heinous, atrocious, or cruel because it involved a strangulation during a burglary and sexual battery and because "while the deceased was lying on the floor, presumably dead or unconscious, the Defendant stepped on her stomach." (R18-19) Although giving it little weight, the trial court found the existence of mitigating factor (f), the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (R19-20) The trial court rejected (a) lack of a significant prior criminal history based upon the defendant's juvenile charges (the most recent of which was five years old), and (g) the defendant's age of twenty years old as mitigating factors. (R19-20,25)

Notice of appeal was filed on November 17, 1980. (R36) This appeal follows.

STATEMENT OF THE FACTS

The following facts were elicited at the penalty phase hearing before the judge:

On December 30, 1979, Detective Larry Lewis was dispatched to a house in Daytona Beach regarding a suspicious death. (T11) Upon arriving at the scene, he found the body of Frances Bowdoin, age 82, lying on the floor of her bedroom. (T12-13) The detective observed dried blood coming from the deceased's nose, bruises on her forearm, a bruise under her ear, and a small abrasion on her pelvic area. (T14,15,24-26)

The medical examiner later determined that the cause of death was suffocation by strangulation. (T90,92) Dr. Botting also noted two lacerations on the victim's head which could have been caused either by a sharp-edged instrument or by the sharp edge of furniture on which she may have fallen. (T80-81) These lacerations would have been sufficient to cause unconsciousness. (T91) Because of a bruise to the vaginal area of the victim, the medical examiner concluded that the sexual assault occurred prior to death, but the doctor could not opine whether the victim was conscious or unconscious at the time. (T91,92) At the scene, the detective had obtained several latent fingerprints from the window area which he had concluded was the point of entry of the intruder. (T27) The detective later compared the latent prints with those of the suspect, Kenneth Quince. (T28,35) Detective Lewis made a positive comparison. (T28,35)

On the basis of this fingerprint identification, Detective Lewis arrested Quince at his home, approximately two blocks from the Bowdoin residence. (T35-36) Quince was taken to the police headquarters, where he signed a waiver of his constitutional rights. (T36) After the officer explained to Quince that the arrest was in reference to a burglary, the defendant denied knowledge of the incident. (T36-37)

The detective asked Quince if he knew where the house in question was, the defendant responding that he had cut the yard for the lady five or six years ago. (T42) After repeated questioning as to whether the defendant had been there more recently, Quince finally told the detective that he had been at the house. (T43) Quince told Detective Lewis that he had burglarized the house, believing no one to be home. (T44) While inside looking for valuables, Quince told the detective, Frances Bowdoin came to the bedroom door and the two spotted each other. (T44) The victim closed her bedroom door and Quince, after trying unsuccessfully a couple of times, managed to force the door open. (T44) The force of the opening door knocked Ms. Bowdoin to the floor. (T44) She stood back up and started to scream, whereupon the defendant, trying to quiet her, grabbed her by the throat, shook her for a while, and pushed her to the floor. (T44) The defendant continued to look for valuables, taking a tape player, a radio, and a ring which he later pawned at three pawn shops. (T44,51) (Detective Lewis later recovered these items at the pawn

to leave, he stepped on the deceased's stomach. (T51)

Detective Lewis questioned the defendant concerning a sexual assault which the police suspected had occurred. (T45-46) Quince denied that any sexual battery had occurred, but, a month later, after the detective confronted him with laboratory test results, the defendant admitted with some embarrassment to the sexual battery, without giving any further details. (T51-53,57-58) (Quince later told psychiatrists that, after pushing the deceased to the floor, and after she was unconscious, her nightgown rode up around her waist, and, becoming sexually excited, he raped her. [R54])

Dr. Ann McMillan, a psychologist who had been appointed by the court to examine Quince specifically for the purpose of determining whether any mental mitigating factors were present, testified that Quince suffered from borderline mental retardation and had severe specific learning disabilities and impairment. (R57;T144) Dr. McMillan told the court that the defendant had a significantly lower mental age and would act more like an eleven year old than an adult. (T147) Quince, who had a judgment disability and was unable to perceive the consequences of his actions, merely reacted to the circumstances of the instant situation, rather than acting through step-by-step planning. (T144,147-149) The homicide and sexual battery, therefore, were committed by a defendant whose capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (T144-145)

The other psychiatrists, all but one of whom were appointed solely to determine Quince's competency to stand trial and sanity, agreed that Quince was of below normal intelligence, in the "dull-normal" range, or borderline mentally retarded. (R54;T111,128-129,157-158) Not having performed any intelligence or personality tests on the defendant, they opined that the mitigating factor of impaired capacity was not present. (T113-115,158,164-165) Dr. Stern, however, stated that Quince "was not functioning with all his marbles" and Quince's borderline intelligence, could, in itself, constitute somewhat of a mental impairment. (T158, 162-163) Dr. Rossario's report indicates that the defendant's judgment is "markedly impaired." (R55)

During the penalty phase hearing the prosecutor elicited from Detective Lewis, over defense counsel's initial objection, that, in Lewis' opinion, the defendant exhibited no remorse. (T56) Detective Lewis did admit, however, that he had never asked Quince how he felt about the incident. (T57) Furthermore, in the pre-sentence investigation, Quince was quoted as saying, "I do have feelings about what happened but it's too late now to say anything more." (R24)

Also during the penalty phase hearing, the trial court initiated questioning about the prospects of rehabilitation for the defendant. (T148) Dr. McMillan stated that Quince, due to his mental condition, would require lifelong supervision. (T148) Dr. Stern testified for the defense that Quince could be rehabilitated. (T165)

During the penalty phase closing argument, the prosecutor was allowed both opening and rebuttal. (T204) In its argument, the state advanced lack of remorse and the possibility of parole as grounds for imposing the sentence of death as opposed to life. (T174,206)

The pre-sentence investigation reveals that the defendant was part of a very large family, having seven living brothers and sisters. (R25) Quince lived with his mother, a custodian at a school, and four sisters. (R26) Quince's father died in an automobile accident when Quince was five years old. (R25) Quince attended school through the tenth grade, receiving very poor grades. (R26,54;SR10) The defendant admitted in the pre-sentence investigation and to the psychiatrists that he drank and smoked marijuana heavily, including the day of the offense. (R26,54,55) Quince began drinking when he was thirteen years old and began the use of drugs at age fifteen. (R54,56)

The trial court did not consider any of the above-stated background of the defendant as non-statutory mitigating factors. (R19-20) The state had argued at the hearing, in an objection to defense examination of a psychiatrist, that the questions were not what the statute requires. (T160,162) The court, in ruling on the objection, told defense counsel to focus on the statutory aggravating and mitigating factors. (T163)

ARGUMENT

POINT I

APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED IN VIOLATION OF THE STATUTE, ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. Introduction

The defendant, upon advice of counsel, pleaded guilty to first degree murder and waived the recommendation of a sentencing jury. (SR5-17) The trial judge, acting, therefore, without the benefit of a sentencing jury, heard testimony at a penalty phase hearing and considered a pre-sentence investigation and psychiatric reports in order to determine the sentence he would impose. (R18) Following the hearing, the trial court sentenced Kenneth Darcell Quince to die in the electric chair for the first degree murder conviction. (R30;T210-212) In so doing, the judge found three aggravating circumstances: (d) the crime was committed while the defendant was engaged in a sexual battery; (f) the crime was committed for pecuniary gain; and (h) the crime was especially heinous, atrocious, or cruel. (R18-19) The court ruled that one mitigating circumstance was present, i.e., (f) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the essential requirements of law was substantially impaired. However,

the court ruled that this factor had little weight. (R19-20)

The sentence of death imposed upon Kenneth Quince must be vacated. The court found improper aggravating circumstances, considered testimony on non-statutory aggravating evidence, failed to give substantial weight to or consider highly relevant and appropriate mitigating factors, and applied incorrect standards for the mitigation, limiting his consideration to the statutory mitigating circumstances. A proper weighing of the applicable circumstances should have resulted in a life sentence.

B. Mitigating Factors, Not Found By The Trial Court, Were Present And The Mitigating Factor Which Was Found Was Given Improper Weight.

Evidence was presented both at the penalty hearing and in the pre-sentence investigation and in the psychiatric reports which clearly established strong statutory and non-statutory mitigating circumstances. A review of these mitigating factors clearly demonstrates that any proper aggravating factors were outweighed by these circumstances. This evidence included, but is not limited to, the following factors.

The defendant lacked a significant history of prior criminal activity. §921.141(6)(a), Fla. Stat. (1979). Particularized consideration of all relevant aspects of a defendant's character and record is mandated before the imposition of the extreme penalty. Woodson v. North Carolina, 428 U. S. 280, 305 (1976). Individualized sentencing

determinations are necessary to meet the unique need for reliability attendant in the determination of whether death is the appropriate punishment in a specific case. Id. See also Lockett v. Ohio, 438 U. S. 586, 605 (1978). To ignore such considerations in fixing the ultimate punishment would be tantamount to treating persons convicted of first degree murder "not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Woodson v. North Carolina, 428 U. S. at 304.

In the instant case, the trial court relied on the defendant's juvenile court record in rejecting the factor of no prior significant criminal history. (R19; Volume II of Record;T4-9) In considering this factor, however, the remoteness in time of the prior juvenile activity is one of the "relevant aspects of Appellant's character and record" which should have been considered by the sentencing judge. Woodson v. North Carolina, supra; Lockett v. Ohio, supra. The last entry on the defendant's juvenile record occurred in 1975, five years prior to the instant case. (R25) The only arrest which the defendant had as an adult was on a charge of loitering and prowling. (R25) Surely, due to the remoteness in time of the juvenile activity, the less significant this prior criminal activity has become. The "criminal history" of the defendant was so remote in time as to have little or no relevance to the determination of this factor at all. Accordingly, the trial

court should have found the lack of a significant criminal history and should have considered this mitigating circumstance in the weighing process.

The trial judge also erred in giving only little weight to Quince's impaired mental state under Section 921.141(6)(f), Florida Statutes. In State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), this Court interpreted this mitigating circumstance, stating:

> Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance.... Like subsection (b), this circumstance is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state.

Applying this definition to the evidence presented in the instant case, it is clear that this mitigating circumstance must be given strong weight. The uncontradicted evidence establishes that Quince was of below normal intelligence, in the "dull-normal" range or borderline mentally retarded. (R54,57;T111,128-129,144,157-158) Dr. McMillan testified that the defendant suffered from severe specific learning disabilities and impairment and had a mental age of only eleven years old. (T144,147)

In Ross v. State, 386 So.2d 1191, 1196 (Fla. 1980), which this Court reversed for resentencing, the trial court had found the defendant's limited intellectual capacity to be a mitigating factor on evidence similar to that presented in the instant case. Also, in Burch v. State, 343 So.2d 831

(Fla. 1977), this Court vacated a sentence of death primarily on the basis of this mitigating factor. See also Jones v. State, 332 So.2d 615, 619 (Fla. 1976). Quince was, according to one psychiatrist, "not functioning with all his marbles" and his borderline intelligence could, in itself, constitute a mental impairment. (T158,162-163) The defendant's judgment was markedly impaired (R55), and Quince was acting under a substantially impaired capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law. (T144-145)

Kenneth Quince, who had a judgment disability and was unable to perceive the consequences of his actions, would do "more reacting rather than step-by-step planning." (T144,147) Dr. McMillan compared Quince's actions in this case to a child who is home alone when he spies a pack of matches; the child "did not mean to play with [the matches], so he saw them, so he did. It is more something that is, that it was there, so you do it without giving any great thought to consequences." (T147-148) Dr. McMillan used the same standard to describe the reason for the sexual battery:

> The same standard would be, she was there and so he did it, with the biological drive and the abnormal personality and intelligence that we are talking about. (T149)

It is submitted that this case is a classic example of substantial mental impairment of the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the essential requirements of law. See Huckaby v. State, 343 So.2d 29 (Fla. 1977), and Shue v. State, 366 So.2d 387 (Fla. 1978). Counsel can conceive of no stronger situation in which this factor would apply.

Additionally, Quince's heavy consumption of alcohol and marijuana, on a regular basis and on the day of the incident increased his mental impairment. (R26,54-56;T144-145) As Justice Ervin noted in his dissenting opinion in Gardner v. State, 313 So.2d 675, 679 (Fla. 1975) (death sentence later reversed by the United States Supreme Court and, upon remand, the defendant was sentenced to life imprisonment), the more enlightened perspective on heavy alcohol and drug use is that it is no longer considered simply an emotional weakness, but rather forms of diseases, which, like other physical and mental ailments, can cause aberrant behavior and require treatment. In Jones v. State, supra at 619, wherein evidence indicated that the defendant had consumed large amounts of alcohol, this Court approved a finding of mental mitigating factors, holding that extreme alcohol usage can be a basis for mitigating punishment. See also Gardner v. Florida, 430 U. S. 349, 352 (1977) (wherein intoxication was held to establish mental mitigating circumstances).

Kenneth Quince suffered from impaired mental capacity due to his low intelligence and judgment disability. Standing alone, these defects produce a strong mitigating circumstance under Section 921.141(6)(f), Florida Statutes. When coupled with Quince's drinking and drug problem, this factor demands even more weight. The court, in finding the presence of this circumstance, should have given it great weight, rather than little weight. Because of this strong factor, a life sentence is clearly called for.

Another factor to be found in mitigation is the defendant's age. The legislative purpose behind this circumstance is to provide for consideration of the age of the defendant "whether youthful, middle aged, or aged -- in mitigation of the commission of an aggravated capital crime." State v. Dixon, 283 So.2d 1, 10 (Fla. 1973). There is no automatic age, then, above which this mitigating factor does not apply. As the trial court correctly noted, each case must rest on its own facts surrounding the totality of the defendant's character and background. (R20) See Lockett v. Ohio, 438 U. S. 586 (1978). But this is as far as the trial court's correctness went. While stating that it had read this Court's decisions concerning age as a mitigating factor, the trial court declined to distinguish those cases in which a similar age was found to be mitigating and to divulge its reasons for rejecting Quince's age as mitigation.

At the time of the incident, Quince was twenty years old. (R20,23) This Court has recognized youthful age in mitigation in Mikenas v. State, 367 So.2d 606 (Fla. 1978)

and Hoy v. State, 353 So.2d 826 (Fla. 1977). Both of these cases involved defendants who were older than Quince; Hoy and Mikenas were twenty-two years of age. Moreover, in King v. State, 390 So.2d 315 (Fla. 1980), and in Hallman v. State, 305 So.2d 180 (Fla. 1974), this Court found age twenty-three as a mitigating circumstance. Moreover, when coupled with the fact that the defendant had a mental age of eleven, was borderline mentally retarded, and was of "dull-normal intelligence," Quince's age becomes an even stronger mitigating factor. See Meeks v. State, 336 So.2d 1142 (Fla. 1976). Thus, the age of Quince is certainly established as a strong mitigating circumstance; the trial court erred in rejecting it.

Furthermore, the trial judge manifestly overlooked and failed to consider and refute other, non-statutory mitigating circumstances which were established by Quince. It appears that this was done in the mistaken belief that the law precluded consideration of non-statutory factors in mitigation. (See R160,162-163, where the trial court, ruling on the state's objection that questions propounded to psychiatrists by the defense were not what the statute requires, told defense counsel to focus on the statutory aggravating and mitigating factors.) This interpretation is clearly erroneous and unconstitutional under Lockett v. Ohio, 438 U. S. 586 (1978), and Songer v. State, 365 So.2d 696 (Fla. 1978). The trial court's limitation of its consideration to statutory mitigating factors requires reversal of the death sentence. See Perry v. State, ____ So.2d ____,

1981 FLW 18 (Fla.Sup.Ct. Case No. 53,003, 12/18/80).

Additional non-statutory factors calling for Kenneth Quince to live include the evidence that Quince had had a tough family and personal life. Quince grew up without a father, who was killed in an automobile accident when Kenneth was five years old. (R25) He was then reared by his mother, who had to work outside the home as a custodian, and lived in a small three-bedroom house along with his seven brothers and sisters. (R25-26) In Neary v. State, 384 So.2d 881 (Fla. 1980), evidence of this type was considered in mitigation, justifying a reversal of a death sentence. Quince, especially due to his extreme learning disabilities, had problems with his schooling, receiving very poor grades, finally giving up on school after the tenth grade. (R26,54; SR10) Similar factors were also considered in Neary v. State, supra. Also, the court should have considered the fact that the defendant cooperated with the police and entered a plea of guilty to the offense, admitting his culpability.

These non-statutory factors which the trial court failed to consider or rebut in its factual findings, together with the strong statutory mitigating circumstances weigh heavily against any aggravating factors and call for the reduction of Quince's sentence to life imprisonment.

C. The Trial Judge Considered Inappropriate Aggravating Circumstances

It is well established that aggravating circumstances must be proven beyond a reasonable doubt. Williams v. State,

386 So.2d 538, 542 (Fla. 1980); State v. Dixon, 283 So.2d 1, 9 (Fla. 1973). The state has failed in this burden with regard to the aggravating factors found by the trial court. The court's findings of fact do not support these circumstances and cannot provide the basis for the sentence of death.

The trial court found, as an aggravating circumstance, that the crime was especially heinous, atrocious, or cruel. §921.141(5)(h), Fla. Stat. Contrary to and notwithstanding the trial court's findings, the facts sub judice fail to support this finding.

This Court has defined this aggravating circumstance in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973):

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

Recognizing that all murders are heinous, Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), this Court further refined its interpretation of the legislature's intent that the aggravating circumstance only apply to crimes especially heinous, atrocious or cruel.

> What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim. State v. Dixon, supra at 9.

Following the above definition, the facts of the homicide sub judice fail to support a finding of this circumstance. While it may be true that death was not instantaneous, the medical examiner testified that upon receiving the lacerations on the top of her head (Quince told police that Ms. Bowdoin had fallen or had been pushed down, striking her head), the victim could very well have lost consciousness. (T91) After losing consciousness, she would have felt no pain whatsoever.

Additionally, according to Quince's statements (which were never disproven beyond a reasonable doubt), he engaged in sexual intercourse only after the victim was unconscious. (R54;T91-92) Bowdoin would therefore not have been aware of the sexual battery. Similarly, as admitted by the court in its written findings, the defendant stepped on the victim's stomach after unconsciousness or death. (R19) Since any wounds or actions occurring after death are irrelevant to this aggravating circumstance, Halliwell v. State, 323 So.2d 557 (Fla. 1975), this factor cannot be used to support heinousness of the offense. Because most of the actions occurred after unconsciousness or death, the homicide was not "necessarily torturous to the victim" as is required by Dixon and Tedder, supra.

It is the duty of this Court to review the case in light of other decisions and determine whether or not the punishment is too great." State v. Dixon, supra at 10; McCaskill v. State, 344 So.2d 1276, 1278-1279 (Fla. 1977).

A comparison to other cases wherein this Court has reduced death sentences to life imprisonment reveals that the instant crime was no more shocking than the norm of capital felonies.

In Halliwell v. State, 323 So.2d 557 (Fla. 1975), the defendant beat the victim's skull with lethal blows from a 19-inch breaker bar and then continued beating, bruising, and cutting the victim's body with the metal bar after the first fatal injuries to the brain. The Halliwell crime is surely more brutal than that of the instant case, yet this Court found in Halliwell's conduct "nothing more shocking in the actual killing than in a majority of murder cases reviewed by this Court." Halliwell, 323 So.2d at 561.

Similarly, the cases of Burch v. State, 343 So.2d 831 (Fla. 1977) (36 stab wounds during frenzied attack); Chambers v. State, 339 So.2d 204 (Fla. 1976) (severely beat girlfriend to death -- victim bruised over her entire head and legs, had a deep gash under her left ear; her face was unrecognizable, and she had several internal injuries); and Jones v. State, 332 So.2d 615 (Fla. 1976) (38 "significant" lacerations on rape victim), involve similar or more gruesome killings. In each of these cases, however, this Court has vacated the death sentences. The appellant's death sentence must likewise be vacated. Were the impositions of life sentences in these and other similar or more heinous cases to be ignored, Florida's death penalty statute could not be upheld under

the requirements of Proffitt v. Florida, 428 U. S. 242 (1976), and Furman v. Georgia, 408 U. S. 238 (1972). See also Godfrey v. Georgia, ____ U. S. ____, 64 L.Ed.2d 398 (1980).

To support his finding that the homicide was heinous, atrocious, or cruel, the trial judge simply recites the actions and injuries concerning the sexual battery and burglary. First, this would obviously be an improper doubling with findings (d) the homicide was committed during the course of a rape, and (f) the homicide was committed for pecuniary gain. See Provence v. State, 337 So.2d 783, 786 (Fla. 1976); Clark v. State, 379 So.2d 97, 104 (Fla. 1979). The factual basis for the heinous, atrocious, or cruel circumstance refers to the same aspect of the defendant's crime as does the sexual battery and as does the pecuniary gain. Therefore, circumstances (d) and (f) cannot be combined and recycled to form circumstance (h) heinous, atrocious, or cruel.

Additionally, if this Court does find sufficient factual basis for the aggravating factor of heinous, atrocious, or cruel, the finding is still improper because the judge failed to consider and weigh the fact that the perceived heinousness of the offense was directly caused by Quince's severe mental problems. This Court has recognized the causal relationship between these aggravating and mitigating circumstances in Huckaby v. State, 343 So.2d 29 (Fla. 1977), and in Miller v. State, 373 So.2d 882 (Fla. 1979).

In Huckaby v. State, supra at 34, this Court held that although the aggravating and mitigating circumstances were equal in number, the mitigating circumstances (which had not been found by the trial judge) must outweigh those in aggravation because the heinous nature of the crime was the direct consequence of the defendant's mental problems. Similarly, in Miller v. State, supra at 886, this Court again noted that the heinous nature of the offense resulted from the defendant's mental impairment. See also Jones v. State, 332 So.2d 615, 619 (Fla. 1976).

The defendant's mental impairment in the instant case can clearly be seen as relating to the perceived heinousness of the offense. Quince did not plan what happened, he merely reacted. (T144,147) Like a child playing with matches, it was there so he did it without even thinking. (T147-149)

To be heinous, atrocious, or cruel, the injuries and killing must be done without pity, with indifference or enjoyment of the suffering of others. State v. Dixon, supra at 9. But because of his mental impairment, it was impossible for Quince to commit this offense with any meanness. Quince's mental incapacity can be compared to that of Lennie, the protagonist in John Steinbeck's Of Mice and Men. In the story, Lennie, who is borderline mentally retarded, kills the wife of Curley, a co-worker, because she screamed while he was alone with her and he panicked. Upon discovering her body, Lennie's co-workers discuss Lennie's mental problems and what should be done:

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> Candy asked, "What we gonna do now, George? What we gonna do now?"
>
> George was a long time in answering. "Guess....we gotta tell the....guys. I guess we gotta get 'im an' lock 'im up...." And he tried to reassure himself. "Maybe they'll lock 'im up an' be nice to 'im."
>
> * * *
>
> Candy said, "He's such a nice fella. I didn' think he'd do nothing like this."
>
> George still stared at Curley's wife. "Lennie never done it in meanness," he said. "All the time he done bad things, but he never done one of 'em mean." Steinbeck, Of Mice and Men, Bantam Books, Inc. (1955), pp. 103-104.

Similarly, due to his mental impairment, Quince committed the acts out of reaction to the situation; he "never done it in meanness."

"Heinous, atrocious, or cruel" is not present in the instant case. Kenneth Quince does not deserve the death penalty; his sentence should be vacated to life imprisonment.

The aggravating factor of "during the commission of the sexual battery" must also fall. The use of the underlying felony as an aggravating circumstance would apply to every felony-murder situation and defeat the function of the statutory aggravating circumstances to confine and channel capital sentencing discretion, and so would violate Furman v. Georgia, 408 U. S. 238 (1972). Stated differently, appellant

case, the death sentence would be automatic for felony-murder. However, there are no guidelines provided by the statute for determining which felony-murder cases receive the death sentence and which do not. Certainly, all felony-murder cases do not, and constitutionally cannot, mandate the death sentence -- a mandatory death sentence would be invalid. E.g. Woodson v. North Carolina, supra. To uphold a death sentence simply because the offense for which it was imposed involved a sexual battery and murder would leave judges and juries with unfettered, unchanneled discretion, would provide no meaningful basis for distinguishing between those felony-murder cases which receive the ultimate penalty and those that receive life, and would thus render the Florida Statute arbitrary and capricious as applied. Cf. Proffitt v. Florida, 428 U. S. 242 (1976); Godfrey v. Georgia, ____ U. S. ____, 64 L.Ed.2d 398 (1980).

Applying such reasoning, the North Carolina Supreme Court invalidated the use of the underlying felony as an aggravating circumstance. State v. Cherry, 257 S.E. 2d 551 (N. C. 1979). The Cherry court found that the death penalty in a felony murder case would be disproportionately applied due to the "automatic" aggravating circumstance, and thus struck the use of the underlying felony as an aggravating circumstance. Thus, this aggravating factor cannot stand.

Finally, Quince's sentence is illegal because improper and non-statutory aggravating factors were presented to the judge at the penalty hearing; in fact, one was even

elicited by the trial judge. The prosecutor elicited from a police detective that, in his opinion, the defendant had shown no remorse. (T56) (But see R24.) The Court inquired of a psychologist as to Quince's chances for rehabilitation; and, upon hearing the answer, the prosecutor argued that Quince should not be given the chance to one day be paroled. (T148,206) It is clearly recognized that evidence of non-statutory aggravating circumstances cannot constitutionally be admitted and considered by either a jury or a judge, even without objection from defense counsel. Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977); Purdy v. State, 343 So.2d 4, 6 (Fla. 1977); Provence v. State, 337 So.2d 783, 786 (Fla. 1976). Therefore, neither lack of remorse, Riley v. State, 366 So.2d 19 (Fla. 1978), nor the possibility of parole of a non-rehabilitative person, Miller v. State, 373 So.2d 882 (Fla. 1979), may be considered. To elicit this testimony was error requiring reversal of the defendant's sentence.

Accordingly, Quince's death sentence was based in substantial part on improper and unsupported aggravated factors. In addition, the sentencing judge ignored the strong and material mitigating factors. These errors are not harmless; the judge utilized these erroneous findings in sentencing Quince to the violent termination of his life. Kenneth Quince's death sentence must be vacated and remanded for the entry of a life sentence.

POINT II

THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TWO ARGUMENTS IN THE PENALTY PHASE OF APPELLANT'S TRIAL, IN VIOLATION OF THE MANDATORY PROVISIONS OF FLA.R.CRIM.P. 3.780.

Rule 3.780, Florida Rules of Criminal Procedure, states that:

> (c) Both the state and the defendant will be given an equal opportunity for argument, each being allowed one argument. The state will present argument first. (emphasis added)

In the instant case, the prosecutor was permitted to rebut defense counsel's argument to the judge. (T204) Defense counsel initially objected to the procedure, but was assured by the court that he would be able to rebut, also. (T204)

In an analogous situation, concerning closing arguments during the guilt phase of a trial pursuant to Rule 3.250, Florida Rules of Criminal Procedure, the courts have held that failure to follow the required procedure concerning arguments is reversible error which cannot be found harmless. E.g., Birge v. State, 92 So.2d 819, 821-822 (Fla. 1957); Raysor v. State, 272 So.2d 867,869 (Fla. 4th DCA 1973); Gari v. State, 364 So.2d 766, 767 (Fla. 2d DCA 1978). In Raysor, supra at 869, the court stated:

> In further extension, we are at a loss as a practical matter to know just how any criminal defendant could in fact make a demonstration of error because of the refusal of the trial court to follow the dictates of the Rule. It is inherent in the procedure,

> as all acquainted with trial tactics know, that the right to address the jury finally is a fundamental advantage which simply speaks for itself.

Although there have been no decisions of this Court construing Fla.R.Crim.P. 3.780, the language of the rule is similar to that of Rule 3.250 in that it is mandatory in nature. [Gibson v. State, 351 So.2d 948 (Fla. 1977), is not dispositive of the issue since Gibson's trial occurred before the passage of Rule 3.780.] The uniqueness of the decision involved in the penalty phase of a capital trial and the relative interests at stake dictate that the rule be strictly followed.

As recognized by Florida courts it is difficult if not impossible for a defendant to demonstrate any specific prejudice as a result of being denied the final argument, and thus it is not required. Birge v. State, supra; Raysor v. State, supra. However, in the present case, a review of the prosecutor's final argument demonstrates that several of his improper arguments occurred during that portion. (T204-206) The error occurred in allowing the state the additional opportunity to rebut what defense counsel had said and in giving the state the opportunity to point out additional factors it had failed to argue during its first argument. This procedure violated the clear language of Rule 3.780 and mandates reversal of the defendant's death sentence for a new penalty trial.

POINT III

THE TRIAL COURT ERRED IN IMPOSING ONE GENERAL SENTENCE UPON THE DEFENDANT'S CONVICTIONS FOR FIRST DEGREE MURDER AND BURGLARY.

In the defendant's judgment and sentence, the trial court adjudicated the defendant guilty of both first degree murder and burglary. (R30) The court then proceeded to sentence the defendant to one death sentence. (R30)

This Court has held in Dorfman v. State, 351 So.2d 954,957 (Fla. 1977), that "general sentences are no longer proper and they may not be imposed by any trial court." A general sentence occurs when the trial court imposes only one sentence after a defendant has been convicted of several offenses. Carroll v. State, 351 So.2d 144, 147 (Fla. 1978). The defendant, receiving one death sentence for both offenses, thus has received an improper general sentence. See also Darden v. State, 306 So.2d 581 (Fla. 2d DCA 1975). The death sentence must be vacated and the case remanded for resentencing.

POINT IV

THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The Florida capital sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied for the reasons discussed herein. The issues are presented in a summary form in recognition that this Court has specifically or impliedly rejected each of these challenges to the constitutionality of the Florida statute and thus detailed briefing would be futile. However, appellant does urge reconsideration of each of the identified constitutional infirmities.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors. Mullaney v. Wilbur, 421 U. S. 685 (1975).

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia, supra; Witt v. State, 387 So.2d 922, 931-932 (Fla. 1980) (England, J. concurring).

The Florida capital sentencing process at both the trial and appellate level does not provide for individualized sentencing determinations through the application of presumptions, and limitations on consideration of and weight given to mitigating evidence and factors. See Lockett v. Ohio, 438 U. S. 586 (1978). Compare Cooper v. State, 336 So.2d 1133,

1139 (Fla. 1976) with Songer v. State, 365 So.2d 696, 700 (Fla. 1978). See Witt, supra.

Execution by electrocution imposes physical and psychological torture without commensurate justification and is therefore a cruel and unusual punishment.

Supreme Court of Florida

THURSDAY, MAY 27, 1982

KENNETH DARCELL QUINCE,	*	
Appellant,	*	CASE NO. 59,954
v.	*	Circuit Court No. 80-48-CC (Volusia)
STATE OF FLORIDA,	*	
Appellee.	*	

Upon consideration of the Motion for Rehearing filed in the above cause by attorney for Appellant,

IT IS ORDERED that said Motion be and the same is hereby denied.

RECEIVED
MAY 28 1982
ATTORNEY GENERAL
DAYTONA BEACH, FLA.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By Tanya Carroll
Deputy Clerk

TC
cc: Hon. V. Y. Smith, Clerk
Hon. S. James Foxman, Judge

James R. Wulchak, Esquire
Shawn L. Briese, Esquire

APP. 4